



October 16, 2000

Susan Combs-Commissioner  
Texas Department of Agriculture  
P O Box 12847  
Austin, Texas 78711

OR2000-4019

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139676.

The Texas Department of Agriculture (the "department") received three requests for related information. One requestor seeks

all records, including but not limited to, memoranda, letters, electronic mail, notes, telephone logs, minutes of meetings, etc., that in any way pertain to any inquiry regarding, application for, discussion of, notification of, consideration of, or issuance of any permits or any other form of authorization pertaining to lethal predator control for livestock protection after January 1, 1995.

Another requestor seeks "a printout of licensed applicators in Hale and Lubbock counties (Private and Non-commercial . . . Farmers)." The third requestor seeks "a copy of the 1999 aerial applicators list for the state of Texas." You claim that a portion of the requested information is excepted under sections 552.103, 552.107, and 552.111.<sup>1</sup> In regard to the remainder of the requested information, you explain that while the department takes no position on its own behalf, the release of this information may infringe on the privacy rights of numerous third parties. On these third parties' behalf, you state that this information may

---

<sup>1</sup>In regard to the information for which you raise exceptions on the department's behalf, you also raise section 552.101 in conjunction with the attorney-client privilege and the attorney work product privilege. However, section 552.101, which excepts from disclosure information deemed confidential under other law, does not incorporate these discovery privileges. See Open Records Decision No. 575 at 2 (1990) (stating that statutory predecessor to section 552.101 does not encompass discovery privileges). The proper exceptions to raise when claiming attorney-client privilege and attorney work product privilege are sections 552.107 and 552.111, respectively. ORD 575; Gov't Code §§ 552.107, .111. Accordingly, we interpret your claims of attorney-client privilege and attorney work product privilege as assertions of those privileges as they are encompassed by sections 552.107 and 552.111.

be excepted under sections 552.101 and 552.107(2) of the Government Code. In addition, the department has notified some or all of these third parties pursuant to section 552.305 so that they may have an opportunity to submit their objections to release of the information at issue.<sup>2</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). Numerous third parties have responded, objecting to the release of information about them on privacy grounds. We have considered the exceptions you and these third parties claim and have reviewed the submitted information.

We begin with the argument that the department has raised on behalf of the third parties in regard to the third parties' names and addresses at issue. The third parties in this case include individuals who are licensed, or who have applied to become licensed, by the state of Texas to use certain predator control devices known as "M-44 devices" and livestock protection collars ("LPCs"). In addition, the department informs us that the third parties may include property owners who own land on which these types of devices are used. The department claims that the third parties' names and addresses may be confidential under section 552.107(2) in conjunction with a federal restraining order.<sup>3</sup> Section 552.107(2) provides that information is excepted from required disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The department has submitted a copy of a temporary restraining order in *John Doe v. Glickman*, No. W99CA335 (W.D. Tex. 2000). However, because the department is not a party to that litigation, the referenced restraining order does not apply to the department. Accordingly, the third parties' names and addresses are not excepted under section 552.107(2).

Next, we turn to arguments raised by third parties on their own behalf. Many of the third parties have submitted written objections to disclosure of their names and addresses based on general privacy grounds. We read these objections as invoking common law privacy as encompassed by section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. This office has long held that names and home addresses are not ordinarily intimate and embarrassing, and are therefore generally not confidential under common law privacy. See Open Records Decision

---

<sup>2</sup>You explain that the department has actually notified the third parties of only the first request, which is the broadest of the three, due to the advice of this office.

<sup>3</sup>The department actually claims section 552.101 as the means of raising the federal order. However, because section 552.107(2), rather than section 552.101, is the appropriate section to raise a restraining order, we interpret the department's claim as raising section 552.107(2).

Nos. 480 at 7 (1987), 455 at 7, 8 (1987), 169 at 6 (1977). Therefore, we find that the general common law privacy argument asserted by many of the third parties lacks merit.

In contrast to the general common law privacy argument raised by many of the third parties discussed above, other third parties have raised a different type of common law privacy argument. As explained above, common law privacy does not ordinarily protect individuals' names or addresses. However, as an exception to that general rule, information may be withheld from public disclosure under section 552.101 in conjunction with common law privacy in "special circumstances." See Open Records Decision No. 169 (1977). We consider "special circumstances" to refer to a very narrow set of situations in which release of the information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6 (1977). Note that special circumstances do not include "a generalized and speculative fear of harassment or retribution." *Id.* Some of the third parties have objected to release of their names and addresses by arguing not just that release of their information would generally violate their privacy rights, but that release of their information might subject them to harassment on the part of animal rights activists.<sup>4</sup> Specifically, these third parties, through their attorney, have argued:

Certain animal environmental activist groups, who have made the use of predator control devices . . . political issues, have begun to seek [p]rivate [i]nformation either to encourage extremists to harass, intimidate, or destroy property of individuals who employ such devices or to badger these individuals themselves. . . .

If information identifying ranchers and farmers who use . . . [predator control devices] is disclosed to any group, it will be impossible to control the dissemination of the information to other perhaps even more radical groups, and the potential for abuse and harm would be great.

We have carefully reviewed and considered this argument. However, we find that these third parties have not adequately shown that release of their information would likely cause them to face an *imminent* threat of *physical* danger. See ORD 169. Therefore, we further find that there is no legal basis for withholding the third parties' names and addresses under common law privacy. Accordingly, the department must release the requested names and addresses of all of the third parties.

We now turn to the information which the department claims on its own behalf is excepted under section 552.111 as attorney work product. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 encompasses the attorney work

---

<sup>4</sup>Specifically, we refer to the third parties who are represented by Mr. Charles S. Kelley of the law firm, Mayer, Brown and Platt.

product doctrine. Open Records Decision No. 647 at 3 (1996). This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W. 2d 193, 195, 202 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. See ORD 647 at 4. When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *id.* at 5.

The department argues that two documents, the "Staff Notes and Recommendation" from file 2424-01-00-0025 and the "Summary of Proposed Enforcement Action" from file 2424-01-98-0011, were prepared by the department's legal staff for preparation and evaluation in regard to two enforcement actions commenced by the department pursuant to Chapter 76 of the Texas Agriculture Code. Based on your arguments and our review of these documents, we find that the documents are excepted under the attorney work product strand of section 552.111. Accordingly, the department may withhold these documents.

We note that the department has questioned whether case files 2424-01-00-0025 and 2424-01-98-0011 should be withheld in their entirety on the theory that the documents discussed above are excepted under section 552.111 and that so much of the remainder of these files reveals certain third parties' names and addresses. However, because the department must release the names and addresses of all third parties, including those referenced in the case files, the department must release both case files, except for the two documents which are excepted under section 552.111 as discussed above.

In conclusion, under section 552.111, the department may withhold from disclosure the document titled, "Staff Notes and Recommendation," and the document titled, "Summary of Proposed Enforcement Action."<sup>5</sup> The department must release the remaining responsive information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

---

<sup>5</sup>Because section 552.111 is dispositive in regard to these two documents, it is not necessary to address the department's arguments regarding section 552.107(1).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Public Information Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open<sup>®</sup>Records Division

EJF\er

Ref: ID# 139676

Encl: Submitted documents

cc: Ms. Laura J. Ireland  
HSUS Government Affairs  
The Humane Society of  
the United States  
2100 L Street, NW  
Washington, DC 20037  
(w/o enclosures)

Ms. Annette Johnson  
Plains Grain Co., Inc.  
P.O. Box 188  
Abernathy, Texas 79311  
(w/o enclosures)

Mr. Kevin S. Boyette  
Rt. 1 Box 1004665  
Kirbyville, Texas 75956  
(w/o enclosures)